Supreme Court, U.S.
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No. 02-1101

In The
Supreme Court of the United States

Mt. Soledad Memorial Association, Inc.,
Petitioner,

v.

Philip K. Paulson,
Respondent,

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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ARGUMENT

I. CERTIORARI IS FULLY APPROPRIATE AND WARRANTED IN THIS CASE TO ENFORCE THE FEDERAL *ERIE* DOCTRINE AND THE FEDERAL CONSTITUTIONAL RIGHTS OF THE ASSOCIATION

Respondent urges on this Court a rule that would preclude review of cases raising questions of whether the fundamental Federal doctrine of *Erie Railroad Company v. Tompkins*, 304 US 64 (1938) has been followed. Such a rule would preclude any enforcement of the *Erie* doctrine. All *Erie* cases involve Federal court rulings on state law questions. If this Court is to preclude review of such rulings because state law is involved, except only in the rarest of circumstances, as Respondent urges, then the lower Federal courts are free to indulge their own social policy preferences and ignore what the state Supreme Court would have done. That is what the final, majority ruling of the Ninth Circuit did in this case.

When a Federal court issues a ruling that is so poorly reasoned and inconsistent with state law precedents that the state Supreme Court would surely not have ruled the same way, the case raises an *Erie* issue for which review by this Court is fully appropriate and warranted. Indeed, this Court must review such a case if *Erie* is to be enforced and not an ignored dead letter. The present case falls into this category, as discussed in detail in the Association's Petition[1], and supplemented further below.

After over a decade of litigation in this case, and after voiding a previous sale not meeting constitutional standards, the District Court that has handled the case from the start

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[1] *Mt. Soledad Memorial Association, Inc. v. Philip K. Paulson*, 02-1101, Petition for a Writ of Certiorari ("Association's Petition").

ruled the sale at issue here constitutional. A three judge panel of the Ninth Circuit unanimously affirmed that decision. But some on the Ninth Circuit were not satisfied with the result of those rulings, which allowed the cross to stand. Petitioners were consequently blackjacked by a 7-4 *en banc* opinion that transparently reads like a rationalization for a predetermined result, based on a state law issue that was not briefed and argued before the panel. Respondent now wrongly argues that there is no valid appeal to this Court for review of that decision.

Moreover, this case presents important issues regarding the Federal Constitutional rights of the Association and others. The Ninth Circuit's ruling unavoidably requires violations of the Federal rights to Freedom of Speech, Freedom of Religion, and Property, for the Association and others, again as discussed in detail in the Petition, and supplemented further below. This applies to the remedies urged by Respondent in its Brief in Opposition[2] as well.

II. THE FINAL MAJORITY RULING OF THE NINTH CIRCUIT DID NOT REMOTELY DECIDE THE CASE AS THE CALIFORNIA SUPREME COURT WOULD HAVE.

The central fundamental fact in this case is that the cross and the land were sold to the highest bidder at fair market value in an open auction. Therefore, the transaction could not have involved aid or a subsidy to religion. Therefore, the transaction could not have violated the No Aid Clause of the California Constitution. The Association's Petition, at 14-18, clearly established that this is California law. This alone should be dispositive of this case.

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[2] *City of San Diego v. Philip K. Paulson,* Case No. 02-1093, *Mt. Soledad Memorial Association v. Philip K. Paulson,* Case No. 02-1101, Brief in Opposition to Petitions for a Writ of Certiorari ("Opposition Brief").

Moreover, the auction was, indeed, open to everyone on the same equal terms, attracting 42 requests for bid applications, and 2 religious bidders, 2 non-religious bidders, and the secular Association bid that won the auction. Respondent even concedes that such an auction would amount to a constitutionally valid transaction. Opposition Brief at 16.

The final Ninth Circuit majority below attempted to circumvent these definitive facts with an illogical argument inconsistent with rudimentary economics and the basic facts of the case. The majority argued that the City gave away the cross for free as part of the sale. The City, the argument goes, consequently gave away for free the means of satisfying the war memorial requirement to those who wanted to keep the cross, since, as Respondent explains the 9th Circuit ruling, "the cross property, without any improvements at all, would have satisfied the one restriction imposed by the City." Opposition Brief at 23. But, the argument continues, the City gave nothing to those who wanted a memorial without the cross. They would have to budget additional monies to build a non-cross memorial, and were consequently at a disadvantage in trying to outbid those who wanted a cross memorial. As Respondent again explains the Ninth Circuit, "bidders seeking to maintain the cross enjoyed a significant relative advantage based on the fact that they did not have to budget additional monies to satisfy the war memorial restriction." Id. at 16.

This argument, the entire rationale for the final, Ninth Circuit majority ruling below, is completely fallacious, on several, independent grounds.

First, the cross was not given away for free. The cross along with the land was put out for bid in open auction.

The cross as well as the land was consequently sold for fair market value as determined by the auction.

Secondly, it is not true that a bare cross with nothing more would have satisfied the war memorial requirement. The bid of the Association, well-ensconced in the record, nullifies that contention. The Association proposed an elaborate memorial with 26 concrete bollards, one every 20 feet around the cross, walls sporting hundreds of plaques honoring war veterans, numerous signs designating the memorial as private property, brick walkways, a flagpole, and other features. Once the Association submitted this elaborate bid, any notion that a bare cross memorial was possible was completely laid to rest. The Association's proposal would have clearly been favored over any bare cross proposal.

Indeed, the financial incentives of the auction were biased against those who wanted to maintain the cross, not those who wanted to remove it. Any war memorial with a cross would have to feature extensive structures and signs to clearly separate the memorial as private property distinct from the rest of the park. That is the function of the concrete bollards and the signs. This constitutionally required separation again shows the complete fallacy behind the notion that a bare cross would satisfy the memorial requirement. A cross memorial would also have to bear the substantial costs of maintaining, repairing, and eventually restoring the 42 foot, 26 ton cross in the face of inevitable deterioration and depreciation over time.

In contrast, Respondent suggests only that a non-cross memorial would bear the costs of removing the cross. The record bears sufficient evidence to show that the cost of building and maintaining the separating features of a cross memorial plus maintaining and eventually restoring the cross

greatly exceed the cost of removing the cross. Moreover, a successful non-cross bidder would have avenues for avoiding even these removal costs. The successful bidder could sell the cross in turn in an open auction for fair market value. The auction could specify that the buyer would bear the cost of removing the cross. The Association and other groups would be interested in the cross for another memorial on private property. Churches would be interested as well in the famous Mt. Soledad cross.

Alternatively, a successful non-cross memorial bidder could refuse the quitclaim of the cross from the Association, which was offered as part of the auction. The successful bidder could then demand that the Association remove its cross from what is now the bidder's private property.

Consequently, a bidder that wanted a memorial with a cross surely faced greater costs than a bidder that wanted a memorial without a cross. Indeed, on the reasoning of Respondent and the final, Ninth Circuit majority below, a non-cross memorial could involve nothing more than a bare flagpole sporting an ordinary flag.

Thirdly, the City could not give away the cross in any event, because the City never owned the cross. The Association has always owned the cross, before, during and after the transaction at issue here.[3] Respondent insists that "whether the City ever owned the cross is constitutionally irrelevant." Opposition Brief at 20. But then Respondent relies on a rationale that the City somehow gave away a

[3] Contrary to the suggestion of Respondent, California law allows the owner of a fixture on another's property to maintain that ownership and remove the fixture if the owner of the fixture desires. Cal. Civil Code Sections 1013.5 and 1019

cross it never owned to favor bidders who wanted to maintain the cross.

Moreover, since all that happened in regard to the cross is that a private association continued to own it before, during and after the transaction, the cross could not possibly have involved impermissable aid to religion. The California Supreme Court made that clear recently in *East Bay Asian v. California*, 24 Cal. 4th 693 (2000). That case stands for the proposition that when a government policy simply leaves a property, in this case the cross, in the same position as before, there is no impermissable aid to religion. Respondent points out that the City sold the surrounding land to the Association in the auction, "to *transform* the status of the property from a government endorsed religious display to a privately held war memorial." Opposition Brief at 15. But surely the sale of that surrounding land with that purpose did not make the transaction unconstitutional.

These are the main reasons why the California Supreme Court could not possibly have ruled the way the final, Ninth Circuit majority did in this case. We submit, therefore, that the Petition should be granted and the Ninth Circuit majority reversed, under the Federal *Erie* doctrine.

III. THE FINAL NINTH CIRCUIT MAJORITY RULING UNAVOIDABLY REQUIRES VIOLATIONS OF THE ASSOCIATION'S AND VETERANS' RIGHTS TO FREEDOM OF SPEECH, FREEDOM OF RELIGION AND PROPERTY.

The cross now sits on over a half acre of land owned privately by the Association. The ruling of the final Ninth Circuit majority unavoidably requires one of two courses. Either the sale of the land to the Association must be invalidated and a new auction carried out, or the government

must order that the privately owned cross on private land be destroyed.

If the sale is now invalidated, that will result only because the Association maintained the cross on its own private land these past 4 years. If the Association or another winning bidder had removed the cross, then there would be no basis for invalidating the sale at all. The invalidation would consequently arise because of the exercise of the free speech and freedom of religion rights of the Association in choosing to maintain the cross. Imposing such a punitive sanction on the exercise of those rights is a violation of those rights.

Moreover, invalidating the sale would be a taking of the private Association's property. This taking would apply not only to the land but also to the extensive improvements to the property undertaken by the Association, which required the investment of huge sums.

While a completely updated record as to the amount of these sums would be desirable for the fully informed decision of this case, there is enough in the record to prove that the Association has undertaken these improvements promised in its bid, and that they surely cost several hundred thousand dollars, at least approaching $1 million. Respondent did not bring this challenge to the sale until almost a year and a half after the auction, and there was considerable evidence of the Association's improvements by the time of the District Court hearing on the challenge. The constitutional violation, in any event, does not turn on the exact amount of investment in improvements. It is enough to show that such costly improvements have been undertaken and completed.

If the City does not compensate the Association for this taking, including the purchase price and the cost of the improvements, then the Association's property rights under the 5th Amendment will be violated. If the City does compensate the Association, then that would be a costly burden for the taxpayers. Surely the City would insist in another auction that it receive back in payment at least what it paid for the property. Who would then be able to compete with the Association in bidding on the property, as the Association could use the compensation funds it had just received to bid for the reacquisition of the property?

In addition, the hundreds of veterans families who have bought plaques on the walls surrounding the cross also have freedom of speech, freedom of religion, and property rights involved that would be violated by invalidating the sale and selling the property to someone else who would remove the cross. Many of them surely consider the cross part of the message they are sending and part of their purchased property interest in the memorial.

If, alternatively, the City or the Association is ordered to remove the cross, that would amount to an unprecedented violation of the free speech and freedom of religion rights of the Association and the veterans families. This would be the first time the government in America has ever forcibly removed a cross from private property. Moreover, once the cross is taken down, what is to prevent the Association from building another cross on their private land? A permanent injunction against the association erecting a cross on its own private land would grossly violate its rights to free speech and freedom of religion.

Respondent replies to these arguments by saying only that it gave notice that it would challenge the sale.[4] But Respondent's notice cannot nullify the constitutional rights of the Association and veterans families, as recognized by the original 3 judge Ninth Circuit panel in this case. ("[T]he fact that the land is private both by its sale and its designation triggers protection of the Association's constitutional rights of Free Exercise and Free Speech." App.35a; "[W]e decline to adopt a rule that would infringe upon private property owners' constitutional rights to display symbols on their land simply because the land sits next to publicly owned land or was formerly public land." App. 37a. Moreover, Respondent did not bring its challenge until almost a year and a half after the auction, and the Association was contractually obligated to the City to carry out its promised improvements. Respondent failed to ask for any injunction that might have prevented developments on the ground from superceding its claims.

These arguments all apply to the remedies proposed by Respondent. The Respondent argues that in a new sale the City could simply "offer to deliver the property with or without the cross, at the buyer's discretion." Opposition Brief at 25. Or, "the City could simply offer the winning bidder a set amount of financial assistance to be used in the buyer's discretion to either construct a new memorial or improve the existing one." Id. But both these remedies require that the 1998 sale to the Association be invalidated, which would violate the constitutional rights of the Association and veterans families as discussed above.

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[4] Respondent challenges the contention that the Ninth Circuit ruling requires destruction of the cross prior to any new sale or viewpoint discrimination, but not the constitutional violations raised by the Association in its Petition.

Respondent contends that these arguments should not be considered until the District Court orders a remedy. But the mandated constitutional violations are already clear. The Association respectfully submits that this Court should not condemn it to bear the financial burden of years of additional, needless litigation against an opponent with limitless resources, when the inevitable result is logically proven now. Indeed, suppose a new sale is ordered and carried out and the Association then wins on these clearly valid constitutional claims? Would we then have to conduct yet another sale and litigate that transaction up and down the Federal courts once more?

CONCLUSION

For all of these reasons, the Association respectfully requests that the Court grant the requested Writ of Certiorari, reverse the final, Ninth Circuit majority ruling, and reinstate the opinion of the original three judge Ninth Circuit panel in this case.

Respectfully submitted,

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